Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1978

No. ...77-26

ELIZABETH JANE YOUNG CHIN,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
The Charge	8
Reasons for Granting the Writ	9
I. Petitioner's constitutional right not to be placed twice in jeopardy for the same offense was violated when, after a jury acquittal on conspiracy to violate 18 U.S.C. § 922(a)(3) and a mistrial on a substantive count, she was reindicted and retried on the same evidence	9
II. The Court below misread the statute and violated the intent of Congress in instructing the jury that residence as used in the Omnibus Crime Control and Safe Streets Act of 1968 is defined as "domicile" where Congress used the term residence only	12
III. The trial court misread the intent of Congress and misled the jury in its interpretation of the law; it was error to instruct the jury that the fact that petitioner was a bona fide hunter was irrelevant to the case	16

PAGE

IV. Petitioner's rights under the Fourth Amendment were violated by an illegal search; evidence of the three weapons found in that search should have been suppressed 18

CONCLUSION 19

APPENDIX A—Statutes 1a

APPENDIX B—Judgment and Opinions 5a

Memorandum Decision and Order Denying Motion to Suppress 7a

Memorandum Decision and Order Denying Motion to Dismiss Superseding Indictment 12a

TABLE OF CASES

Aguilar v. *Texas*, 378 U.S. 108 (1944) 18

Ashe v. *Swenson*, 397 U.S. 436 (1970) 11

Bell v. *United States*, 349 U.S. 81 (1955) 15

Brown v. *Ohio*, — U.S. —, decided June 16, 1977, 45 LW 4697 ..... 9, 10, 11

Corwin v. *Interpublic Group of Companies, Inc.*, 512 F.2d 605 (2d Cir. 1975) 14

Dumbra v. *United States*, 268 U.S. 435 (1925) 19

Herring v. *New York*, 422 U.S. 853 (1976) 17

Ianelli v. *United States*, 420 U.S. 770 (1975) 11

Jeffers v. *United States*, — U.S. —, decided June 16, 1977, 45 LW 4691 9

Nathanson v. *United States*, 290 U.S. 41 (1933) .. 18

Rewis v. *United States*, 401 U.S. 808 (1971) 15

PAGE

Scarborough v. *United States*, — U.S. —, decided June 6, 1977, 45 LW 4570 ..... 15, 16

Sealfon v. *United States*, 332 U.S. 575 (1948) 10

Sgro v. *United States*, 287 U.S. 206 (1932) 18

Spinelli v. *United States*, 393 U.S. 410 (1969) 18

United States v. *Beleulfino*, 508 F.2d 58 (1st Cir. 1974) 19

United States v. *Damitz*, 495 F.2d 50 (9th Cir. 1974) 19

United States v. *Feola*, 420 U.S. 671 (dissent Stewart, J.) (1975) 15

United States v. *Harris*, 403 U.S. 573 (1971) ... 18, 19

United States v. *Hunt*, 496 F.2d 888 (5th Cir. 1974) 19

United States v. *Mendoza*, 487 F.2d 309 (5th Cir. 1973) 19

United States v. *Prewitt*, 534 F.2d 200 (9th Cir. 1976) 19

United States v. *Ramirez*, 279 F.2d 712 (2d Cir. 1960) 19

United States v. *Thomas*, 489 F.2d 664 (5th Cir. 1973) 19

STATUTES

18 U.S.C. § 922 2

18 U.S.C. § 922(a)(3) 2, 3, 4, 9, 12

18 U.S.C. § 922(a)(6) 18

28 U.S.C. § 1254(1) 2

Section 901, Public Law 90-315 ..... 3, 8

United States Constitution Sixth Amendment 11

OTHER AUTHORITIES

	PAGE
Reese and Green, "That Elusive Word 'Residence' ", 6 Vanderbilt L. Rev. 561 (1953)	14
Senator Brewster, 114 Cong. Rec. 13338	16
Senator Kennedy, 114 Cong. Rec. 13331	14
Senator Long, 114 Cong Rec. 13868	16
Senator Randall, 114 Cong Rec. 16296	16

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The petitioner, Elizabeth Jane Young Chin, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on March 21, 1977.[1]

Citations to Opinions Below

The opinions of the District Court on the issue of suppression of the search warrant and motion to dismiss on the grounds of double jeopardy are unreported and appear in Appendix B *infra* pp. 8a-15a. The Court of Ap-

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[1] Petitioner will be joined by her husband, the co-defendant below, who also seeks certiorari. Some of the grounds he urges are common to both cases; others are different.

peals affirmed from the bench, reading a lengthy oral opinion. A copy of that opinion has been requested by counsel but to date it has not been received.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 21, 1977. A petition for rehearing was denied by that Court on May 10, 1977. Mr. Justice Marshall extended the time for petitioner to file this petition until July 5, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1) Whether a prior jury verdict of not guilty on the issue of conspiracy to violate Section 922 (a)(3) of Title 28 [Omnibus Crime Control and Safe Streets Act of 1968] did not bar on double jeopardy grounds a second trial on a new indictment involving the same evidence?

In this connection was not the government estopped by considerations of collateral estoppel from retrying the residency issue necessarily decided by petitioner's acquittal of conspiracy to violate the law?

2) Whether the trial court committed error in instructing the jury (over objection) that "residence" means "domicile" as used in a criminal statute (18 U.S.C. § 922) where Congress, with opposite intention, referred to "residence" only in formulating the law.

3) Whether, in view of Congress' express direction that the Omnibus Crime Control and Safe Streets Act of 1968 was not directed against

hunters or their lawful possession of weapons for hunting, it was not error for the court to exclude evidence of petitioner as a hunter, to prevent counsel from arguing this fact in summation and to advise the jury to disregard this fact in its deliberations.

4) Whether affidavits alleging no crime, containing false allegations concerning events remote in time and place were insufficient under the Fourth Amendment to establish probable cause for a search warrant?

Statute Involved

The statutory provisions involved are 28 U.S.C. § 922 (a)(3) and Section 101, Public Law 90-618 and Section 901, Public Law 90-315. These sections appear in Appendix A *infra* pp. 1a-4a.

Statement

Petitioner and the co-defendant, both ardent hunters, possessed several guns in their home used for hunting. Her conviction on a joint charge, along with him, of illegally transporting one of the weapons from California to New York (where she was alleged to reside) was based on a new indictment brought after a jury had acquitted her on a charge of conspiracy with the co-defendant to transport weapons into the State of New York. This new indictment and trial clearly violated the Double Jeopardy Clause of the Constitution.

The conviction under the second new indictment was obtained only after the trial court had misled the jury as to the meaning of "residence" as used by Congress in the Omnibus Crime Control and Safe Streets Act of

1968. The court told the jury that "residence" meant "domicile", contrary to the expressed language of the statute and the intent of Congress. The court further disregarded the intent of Congress which was to protect hunters, as opposed to the "criminal element" in the transportation of weapons across state lines in its rulings.

Petitioner and co-defendant Kenneth Raymond Chin (her husband) were originally indicted jointly in a two-count indictment. It charged:

> 1) Conspiracy to obtain and transport four separately described rifles from California to Brooklyn, New York where they resided. The overt acts alleged in support of the conspiracy were the purchase by petitioner of one of the four rifles in California on July 29, 1975 and possession of all four of the weapons by defendants in their apartment in Brooklyn on October 4, 1975.
>
> 2) Between August 15, 1975 and October 7, 1975, the two defendants illegally transported from California to New York the same four weapons described in the first count, contrary to the same section of law as Count One [28 U.S.C. § 922(a)(3)].

Prior to trial both defendants moved to suppress the four weapons on the grounds that they had been seized in defendants' apartment on the authority of a search warrant issued without probable cause. None of the allegations in two affidavits (one sealed) supporting the search warrant were sufficient.

On motion of petitioner, and with the consent of the government, petitioner's case was severed from that of the co-defendant and petitioner went to trial on the two count indictment. The government produced evidence by

way of records that petitioner and the co-defendant Chin, then unmarried, had lived at an apartment at 825 Union Street from sometime in 1974 through October 4, 1975. Testimony was introduced that Ms. Young had purchased a rifle in California showing a valid California driver's license on July 29, 1975.

Petitioner countered the evidence on residency with testimony (unrebutted) that she had had a quarrel with co-defendant Chin and had left him in early summer of 1975 to return to her parents home in California on a one way ticket, and to take up residence in California where she looked for work and applied for unemployment insurance. Later in August, she changed her mind and returned to New York. These facts were established by the testimony of her father and another witness. Other witnesses testified that petitioner and her later-to-become husband were ardent hunters and used their rifles for hunting.

After deliberation, the jury acquitted petitioner of the first count (conspiracy with co-defendant Chin to transport any of the three weapons from out of the state into the state where she was a resident).[2] The jury could not agree on the substantive count and a mistrial was declared.

The government declined to retry petitioner on the count on which the jury disagreed, but instead obtained a new superseding indictment jointly charging both petitioner and co-defendant Chin with illegally obtaining,

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[2] The trial court judge had stricken all the evidence as to one of the four weapons and did not submit the issue as to that weapon to the jury.

transporting and receiving of the same four weapons.[3] A motion to the trial court to dismiss the indictment against petitioner on grounds of double jeopardy and collateral estoppel was denied.

At the second trial, just as at the first, the government produced evidence that three of the four rifles described in the indictment were found in defendants' Brooklyn apartment on October 4, 1975, pursuant to the execution of a search warrant. A fourth weapon was found in a gun shop in upper New York State. The government then produced testimony of a sporting goods store salesman in Inglewood, California, again as at the first trial, that on July 29, 1975 he had sold a rifle to Elizabeth Jane Young, that he had filled out a form required by law and that she had identified herself by way of a valid California driver's license. A similar form for a sale to a Marc Choyoi Kondo on August 12, 1975 by the same sporting goods store was produced to show that a second rifle found in the defendants' Brooklyn apartment had been sold to Kondo in California.[4]

Again, just as in the first trial various postal employees testified to change of mailing address forms having been filed for each of the defendants from Los Angeles to New York in 1974, and finally to 925 Union Street in Brooklyn on August 30, 1974, and that there were no change of mailing address cards from the Brook-

[3] Despite the court's prior striking of the evidence concerning the fourth weapon at the end of the entire case at the petitioner's first trial, the new indictment included that weapon and evidence was introduced at the new trial concerning that weapon. Petitioner was convicted by the second jury on this count.

[4] This testimony was objected to by petitioner on the ground that all the evidence concerning this weapon had been stricken at the conclusion of the first trial of Ms. Young. The objection was overruled.

lyn street address of the defendants from January 1, 1975 to the date of trial.

An owner of a gun shop in upper New York State "in the heart of hunting country", testified as he had at the first trial that he had first met the defendants on August 30, 1975 in his gun shop in Washingtonville, New York; that he had conversed with them on the subject of guns and hunting, and that they had, a week later, left a rifle with him for repair. The shop owner testified that petitioner had told him that she was looking for an all around shotgun for hunting small game.[5]

Again just as at the first trial the landlord of 925 Union Street testified that rent had been paid every month from August, 1974 to the time of trial on the premises at 925 Union Street, Brooklyn rented to Kenneth R. Chin and Elizabeth Jane Young. Similarly, a Gas Company representative, a Con Ed service representative, and a Telephone Company representative testified that Con Ed, gas and telephone bills were paid regularly throughout the same period—and that the record name on the bills was Elizabeth Young.

The petitioner produced witnesses to show that while Kenneth Chin remained in New York throughout July and August, 1975, she went back to California where she had formerly lived and where her parents lived. Charles Young, the defendant's father, had originally testified at the first trial that his daughter had returned to California on a one-way ticket because "she's" breaking up with Kenny and she wants to work in California"—and further that she had signed up for unemployment insur-

[5] Although the court permitted this testimony brought out on cross-examination about hunting, it cautioned counsel repeatedly that whether or not the defendants were hunters was completely irrelevant to the case.

ance in California. When Mr. Young appeared at the second trial, the court did not permit him to again testify to these facts, urged by petitioner to show her state of mind when she left New York.

The Charge

The court cited the purpose of Congress in passing the Federal Gun Control Act of 1968, but specifically left out any mention of Congress' expressed desire not to "place any unnecessary federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity". (See 101 Pub.L. 90-618), Appendix A p. 4a.

Despite objection, the court instructed the jury that "residence" as used in the statute is defined in legal terms as "domicile".

The court further instructed the jury over objection that it could infer from the fact of the possession of the weapons by the defendants in October, 1975 "that the accused [meaning both defendants] participated in the unlawful transportation of the weapons". This in effect was a directed verdict of "guilty".

Reasons for Granting the Writ

I.

Petitioner's constitutional right not to be placed twice in jeopardy for the same offense was violated when, after a jury acquittal on conspiracy to violate 18 U.S.C. §922(a)(3) and a mistrial on a substantive count, she was reindicted and retried on the same evidence.

This Court has recently reconsidered its interpretation of the Double Jeopardy Clause in *Jeffers* v. *United States*, — U.S. — decided June 16, 1977, 45 LW 4691 and *Brown* v. *Ohio*, — U.S. — decided June 16, 1977, 45 LW 4697. In *Brown* this Court held that "the Double Jeopardy Clause prohibits a State or the Federal Government for trying a defendant for a greater offense after it has convicted him of a lesser offense." (45 LW 4695). The same rule would follow if the defendant has been acquitted of the lesser offense.

It was the theory of the government's case in the instant case in both trials of petitioner (and under both indictments) that she and the co-defendant Chin agreed that she should go to California to purchase or obtain weapons and bring them back to New York where they continuously resided together. The government's proof of this violation of the statute was allegedly evidence 1) of transportation of the weapons and 2) continuous residence by both defendants in New York throughout July and August 1975 coupled with 3) acquisition of the weapons in California and the presence of the weapons in New York in October 1975.

There was undisputed evidence of the purchase of one of the four weapons by petitioner in California in July, 1975, of the continuing residence of the co-defend-

ant in New York throughout the period, and the presence of three of the weapons in New York in the petitioner and co-defendant's jointly occupied Brooklyn apartment in October 1975. Petitioner disputed, however, any continuing relationship with the co-defendant in July, 1975, and so any illegal agreement with him to obtain any weapons in California. She further disputed any continuous residence in New York, but instead asserted that she quarreled with the co-defendant and changed her residence from New York to California where she was a legal resident when she purchased the one weapon on which her conviction was finally based. The first jury agreed with her contention to the extent of acquitting her on the conspiracy charge and finding true her contention that there was no agreement, and also finding for her, at least partially, in her change of residence claim.

Petitioner asserts here on analogy from *Brown* that her acquittal on the conspiracy charge had the effect of an acquittal on a lesser included offense within the substantive crime and that the government was thereafter barred from reindicting her and retrying her anew on an accusation which required a jury to find joint action and agreement between petitioner and the co-defendant. This Court ruled, consistent with petitioner's contention in *Sealfon* v. *United States*, 332 U.S. 575, 579, 580 (1948):

> "The basic facts of each trial were identical . . . Thus, the core of the prosecutor's case was in each case the same . . . There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement . . . It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do."

Petitioner also asserts that the charges of conspiracy and violation of the substantive weapons count merge and accordingly the second prosecution was improper under Wharton's Rule. See *Ianelli* v. *United States*, 420 U.S. 770 (1975).

As an additional ground for certiorari petitioner asserts that it was prejudicial error, also under the Double Jeopardy Clause, for petitioner to be retried and have evidence submitted to the jury on a weapon count that had been withdrawn from the first trial jury's consideration and declared by the court to be based on insufficient evidence. The second jury convicted her on this count (Count II) but the court set that conviction aside at the time of sentence. The resubmission to a second jury of this issue, along with the other issues, deprived petitioner, in addition, of her right to a fair trial under the Sixth Amendment.

Finally, with regard to her Double Jeopardy claim, petitioner asserts the bar of collateral estoppel on the narrow issue of the evidence adduced on the subject of her residence in California and her over-all non-criminal intent. "That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal" (*Brown* 45 LW 4699). See *Ashe* v. *Swenson*, 397 U.S. 436 (1970). At the first trial her father was permitted to testify on the issue of her residence, and where she intended to live, by recounting a conversation in which she told him of her quarrel with the co-defendant and her intention to move back to California to live. Although the first jury found favorably to her on this issue by acquitting her of any illegal agreement with the co-defendant, the second jury was not so advised and in fact the father was barred from giving the same favorable (to his daughter) testimony at that second trial.

II.

The Court below misread the statute and violated the intent of Congress in instructing the jury that residence as used in the Omnibus Crime Control and Safe Streets Act of 1968 is defined as "domicile" where Congress used the term residence only.

The pertinent sections of the statute involved read:

"§ 922

(a) It shall be unlawful

. . . . . .

(3) for any person [other than a licensed importer, etc.] to transport into or receive in the State where he resides any firearm purchased outside the State. . . ."

In 1968, Congress declared as its purpose in passing the law that

> "The Congress hereby declares that the purpose of this title . . . is to provide support to Federal, State and local law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes. . . ." Appendix p. 4a.

In order to further implement the Act, the Department of the Treasury (Bureau of Alcohol, Tobacco and

Firearms) presumably having in mind congressional intent, issued its official interpretation of the meaning of the law for the reading and understanding of the citizens affected by it in "Gun Control Act, Questions and Answers" [Pub. No. ATF P 7580.1].

Relevant sections interpreting the Act read as follows:

"(25) May a non-licensee transport firearms interstate for sporting purposes?

> "Generally yes. However, the Gun Control Act makes it unlawful for certain persons, such as felons, to engage in the interstate transportation of any firearms or ammunition.

"(26) Is there a Federal Permit which allows an individual to take his personal firearms into another state or carry them locally?

> "No. Any requirement in this area is the responsibility of State and local authorities. (Pub. 712).

"(29) What constitutes residency in a State?

> "The state of residency is the State in which an individual regularly resides or maintains his home. . . .

"(30) Can a person who resides in one State and own property in another State purchase a firearm in either State?

> "If the person maintains a home in both states and resides in both states for certain periods of the year, he may, while residing in each particular state, purchase a firearm in that state. . . .

. . . . . .

"(32) Can a person who is relocating out of state move his firearm with other household goods?

> "Yes, he may transport Title I firearms if he is not prohibited by [provisions not relevant here]."

It is clear from a reading of these sections that the law contemplates a person having more than one residence; that a person who has more than one residence may move his rifle or weapon along with other effects between residences and particularly may do so for hunting purposes.

The court in this case in equating "residence" with "domicile" effectively read out of the law what it clearly meant.

The distinction between domicile and residence is often significant in the law. A recent case in the Second Circuit involved this issue. In *Corwin* v. *Interpublic Group of Companies, Inc.*, 512 F.2d 605, 610 (2d Cir. 1975), the court noted that for purposes of a tax statute designed to benefit creditors, the congressional choice of the word "residence" rather than "domicile" should be respected—that the two words do have a different meaning and the difference can be significant.

> ". . . every person has at all times one and only one domicile for the same purpose . . . while a person can have more than one residence."

Also see Reese and Green, "That Elusive Word 'Residence'", 6 Vanderbilt L. R. 561 (1953).

Petitioner's conduct—assuming her transportation of the rifle from California to New York—was in all respects within the law.[6] This is clear from the language

[6] Petitioner bought the rifle referred to in Count I legally in California and could have bought the same rifle legally in New York, c.f. remarks of Senator Kennedy 114 Cong. Rec. 13331.

used by Congress, i.e. "residence", the preamble and statement of purpose of the law—that it was not aimed against hunters and other persons lawfully possessing weapons—and the interpretation given the section by the Department of the Treasury.

The jury, however, was not permitted to construe residency as Congress expressly intended, nor was it given the right to consider Congressional intent concerning hunting, see Point III, *infra*.

Defendant Young brought this to the court's attention by excepting to the charge and by requesting an instruction on the residency issue indicating the relevant portions of the Department of the Treasury handbook.

Assuming, however, *arguendo*, that the statute was ambiguous, the gratuitous and narrow construction of the law given the jury by the trial judge in substituting "domicile" for "residence" was in conflict with the time-honored rule of lenity to be applied in criminal cases. Said Justice Frankfurter for this Court in *Bell* v. *United States*, 349 U.S. 81, 83 (1955):

> "When Congress leaves to the Judiciary the task of imputing to Congress an undecided will, the ambiguity should be resolved in favor of lenity."

Also see *Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *United States* v. *Feola*, 420 U.S. 671 (dissent Stewart, J., p. 712) (1975). *Scarborough* v. *United States*, — U.S. — decided June 6, 1977, 45 LW 4570 (dissent Stewart, J., p. [illegible]).

III.

The trial court misread the intent of Congress and misled the jury in its interpretation of the law; it was error to instruct the jury that the fact that petitioner was a bona fide hunter was irrelevant to the case.

This Court has recently looked to the intent of Congress in interpreting another section of the Omnibus Crime Control and Safe Streets Act of 1968 in *Scarborough* v. *United States* — U.S. —, decided June 6, 1977, 45 LW 4570, 4572 et seq.

In addition to the express preamble to the Act quoted, *supra*, p. 12, the Congressional record abounds with the legitimate concern of Congress to protect the rights of hunters so that the law not be made burdensome to them. See Senator Long, 114 Cong. Rec. 13868, Senator Randall, 114 Cong. Rec. 16296. On the Senate floor, Senator Brewster queried:

> "Many hunters already own their own rifles or shotguns. Is there anything in this bill that would preclude such a person from taking his rifle or shotgun anywhere in the country, using it for lawful hunting purposes and bringing it back home? No."
>
> "Many hunters and sportsmen who do not already own their rifle or shotgun, like to purchase these weapons out of State, perhaps where they have gone hunting. Is there anything in this bill which would preclude them from buying over the counter a rifle or shotgun anywhere in the country? No." 114 Cong. Rec. 13338.

It was probably thought by the legislators that their extensive concern with legitimate hunters on the one

hand, and the "criminal element" on the other hand, in the drafting of the Omnibus Law would be clear to prosecutors in deciding whom to indict. So would it be clear to courts charged with trying cases and instructing juries that legitimate hunters were not the target of the criminal legislation. The courts below, contrary to the intent of Congress, ignored these considerations.

The government itself adduced evidence that the defendants, and petitioner particularly, were law-abiding citizens in that they paid their bills promptly and made legal application for gun permits, etc. The government produced witnesses who attested to petitioner's being a hunter and making application for a rifle permit which included a declaration of good character.

Nonetheless, the court excluded all mention of both, directed the jury to disregard any evidence on this subject of hunting and threatened to hold defense counsel in contempt for mentioning these relevant facts in her summation.

This was an interference with counsel's legitimate right to sum up. See *Herring* v. *New York*, 422 U.S. 853 (1976).

This blatant disregard of congressional intent requires a hearing by this Court.

IV.

Petitioner's rights under the Fourth Amendment were violated by an illegal search; evidence of the three weapons found in that search should have been suppressed.

The search warrant was issued by a Magistrate and was based on allegations in two affidavits of a Special Agent of the Secret Service. One affidavit was publicly filed, the other sealed, to be revealed to defense counsel only in part, and during proceedings on a motion to suppress.

The assertions in the affidavits were insufficient under the rules established by this Court in *Nathanson* v. *United States*, 290 U.S. 41, 47 (1933); *Aguilar* v. *Texas*, 378 U.S. 108 (1944), and *Spinelli* v. *United States*, 393 U.S. 410 (1969) for the following reasons:

1) Allegations by which the Magistrate could conclude that weapons were present in defendants' apartment in New York concerned the purchase of one weapon by petitioner in California, 66 days before the affidavit; the facts were thus too remote in time and concerned events 3000 miles apart. *Sgro* v. *United States*, 287 U.S. 206, 210 (1932); *United States* v. *Harris*, 403 U.S. 573 (1971).

2) No facts supporting the commission of a crime were alleged. It was alleged in the affidavit that petitioner purchased a firearm in California on July 29, 1975, with a driver's license, bearing her true name and the address of her California residence, asserting that she had moved from California to New York. It was charged that this conduct involved a violation of 18 U.S.C. § 922(a)(6) [purchasing a firearm with false identification]. The facts alleged were not sufficient to support

this charge (See *United States* v. *Mendoza*, 487 F.2d 309 (5th Cir. 1973) and neither grand jury indicted defendants for this offense. Moreover, there was no allegation that any crime had taken place at the premises to be searched. *United States* v. *Ramirez*, 279 F.2d 712, 715 (2d Cir. 1960); *United States* v. *Harris*, 403 U.S. 573, 579 (1971); *Dumbra* v. *United States*, 268 U.S. 435, 441 (1925).

3) Material misstatements occurred in the second, sealed, affidavit to the effect that the affiant had checked with the post office department and had determined that petitioner and one Joanne Miyamoto lived together at a certain address in Los Angeles three years before. This allegation was supposed to connect petitioner with "subversive" activities which could be a threat to the life of Emperor Hirohito of Japan who was about to visit New York City. The allegation concerning petitioner's living with Joanne Miyamoto was false and a check of postal records, if it had been made as alleged, would have so shown. See *United States* v. *Hunt*, 496 F.2d 888, 894 (5th Cir. 1974); *United States* v. *Thomas*, 489 F.2d 664 (5th Cir. 1973); *United States* v. *Damitz*, 495 F.2d 50 (9th Cir. 1974); *United States* v. *Belculfino*, 508 F.2d 58, 60-63 (1st Cir. 1974); *United States* v. *Prewitt*, 534 F.2d 200 (9th Cir. 1976).

CONCLUSION

This Court should issue a Writ of Certiorari to review the judgment below.

Respectfully submitted,

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Dated: July 1, 1977

APPENDIX

APPENDIX A—STATUTES

18 U.S.C. § 922. Unlawful acts

(a) It shall be unlawful—

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a rifle or shotgun obtained in conformity with the provisions of subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

Section 101 Public Law 90-618

Congressional Findings and Declaration. Section 101 of Pub.L. 90-618 provided that: "The Congress hereby declares that the purpose of this title [which amended this chapter] is to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private

ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title."

Section 901, Public Law 90-315

Section 901 of Pub.L. 90-351 provided that:

"(a) The Congress hereby finds and declares—

"(1) that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power;

"(2) that the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others whose possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States;

"(3) that only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the businesses of importing, manufacturing, or dealing in them, can this grave problem be properly dealt with, and effective State and local regulation of this traffic be made possible;

"(4) that the acquisition on a mail-order basis of firearms other than a rifle or shotgun by nonlicensed individuals, from a place other than their State of residence, has materially tended to thwart the effectiveness of State laws and regulations, and local ordinances;

"(5) that the sale or other disposition of concealable weapons by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms;

"(6) that there is a causal relationship between the easy availability of firearms other than a rifle or shotgun and juvenile and youthful criminal behavior, and that such firearms have been widely sold by federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior;

"(7) that the United States has become the dumping ground of the cast-off surplus military weapons of other nations, and that such weapons, and the large volume of relatively inexpensive pistols and revolvers (largely worthless for sporting purposes), imported into the United States in recent years, has contributed greatly to lawlessness and to the Nation's law enforcement problems;

"(8) that the lack of adequate Federal control over interstate and foreign commerce in highly destructive weapons (such as bazookas, mortars, anti-tank guns, and so forth, and destructive de-

vices such as explosive or incendiary grenades, bombs, missiles, and so forth) has allowed such weapons and devices to fall into the hands of lawless persons, including armed groups who would supplant lawful authority, thus creating a problem of national concern;

"(9) that the existing licensing system under the Federal Firearms Act [former sections 901 to 910 of Title 15] does not provide adequate license fees or proper standards for the granting or denial of licenses, and that this has led to licenses being issued to persons not reasonably entitled thereto, thus distorting the purposes of the licensing system.

"(b) The Congress further hereby declares that the purpose of this title [enacting this chapter and repealing sections 901 to 910 of Title 15] is to cope with the conditions referred to in the foregoing subsection, and that it is not the purpose of this title [enacting this chapter and repealing sections 901 to 910 of Title 15] to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title [enacting this chapter and repealing sections 901 to 910 of Title 15] is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title [enacting this chapter and repealing sections 901 to 910 of Title 15]."

APPENDIX B—Judgment and Opinions

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-five day of March, one thousand nine hundred and seventy-seven.

Present: HON. WILLIAM H. TIMBERS
HON. THOMAS J. MESKILL
Circuit Judges

HON. CONSTANCE B. MOTLEY
District Judge

76-1420

76-1517

76-1456

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Appellant.

—v.—

KENNETH RAYMOND CHIN, ELIZABETH JANE YOUNG,
n/k/a Elizabeth Jane Young Chin,
Defendants-Appellants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

by ARTHUR HELLER
Deputy Clerk

Memorandum Decision and Order Denying Motion to Suppress

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
No. 75-CR-851

UNITED STATES OF AMERICA,

—against—

ELIZABETH JANE YOUNG and KENNETH RAYMOND CHIN,
Defendants.

February 23, 1976

MISHLER, *C.J.*

Defendants are charged with illegally transporting firearms in interstate commerce in violation of 18 U.S.C. § 922(a)(3) and (6), and with conspiracy to commit the offense, 18 U.S.C. § 371. Defendants move, pursuant to F.R. Crim P. 41, to suppress as evidence weapons and other material seized during a search of apartment 4B in premises 925 Union Street, Brooklyn, New York on October 4, 1975, which search was authorized by a search warrant issued by United States Magistrate Vincent A. Catoggio on October 3, 1975. The motion which the government submitted to support its request for the search warrant attacks the sufficiency of the affidavits which the government submitted to support its request for the search warrant.[1]

[1] Two affidavits made by Special Agent Neal Findley of the United States Secret Service, both sworn to October 3, 1975, were submitted to the magistrate. One of the affidavits (described as the supplemental affidavit) was ordered sealed by the magistrate on application of the United States Attorney, on the representation that revelation of the information would place the informant's life in jeopardy. The supplemental affidavit, with paragraph 2 excised, was made available to defendants' counsel at oral argument of this motion. The government represented that the safety of the informant required that the information contained in paragraph 2 be withheld.

Memorandum Decision and Order Denying Motion to Suppress

Defendants argue that (1) the affidavits are insufficient as a matter of law since they fail to state facts indicating that a federal crime was probably committed; (2) the affidavits fail to establish a nexus between the purchase of a gun in California and the likelihood of its presence at the apartment sought to be searched; and (3) the search was not timely made.[2] Defendants also charge that the warrant issued was based on false statements that affected the magistrate's probable cause determination.[3]

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[2] The time lapse from purchase of the gun in California, July 29, 1975, to the day of the search, October 4, 1975, was 67 days.

[3] Findley's affidavit, in which he stated the grounds for his information and belief that one (1) AR-180 semi-automatic rifle, bearing Serial Number S-12585, was concealed at 925 Union Street, Brooklyn, New York, is as follows:

1. An interview by Special Agents of the United States Secret Service of Carl V. Copeland, Jr., a salesman at Coles Sporting Goods Store, Inglewood, California, a licensed firearms dealership, wherein he stated that he sold the above-described firearm, serial number S-12585, for $270 to a person who identified herself as Elizabeth Jane Young on July 29, 1975.

2. At the time of the purchase described in paragraph 1 above, Copeland advised that Elizabeth Jane Young identified herself by means of a California driver's license, N-3849891, which reflected her address to be 1555 6th Avenue, Los Angeles, California. Investigation by your deponent and other Special Agents of the United States Secret Service which revealed that on June 11, 1974, Elizabeth Jane Young notified United States Postal Service authorities in Los Angeles, California to forward all mail addressed to her to 3306 92 Street, Apartment 5L, Jackson Heights, New York.

3. Further investigation by your deponent and other Special Agents of the United States Secret Service which

[Footnote continued on following page]

Memorandum Decision and Order Denying Motion to Suppress

The disclosed portions of the supplemental affidavit allege that the Federal Bureau of Investigation supplied information to the United States Secret Service that Joanne Miyamoo and Mary Kochiyama were members of the Asian Americans for Action, which organization had demonstrated against the United States-Japanese security treaty, and that Kochiyama was a contact for various extremist groups, including the Black Panther Party and the Black Liberation Army. These portions also allege that Miyamoto and Kochiyama pose a threat to the personal safety of the Emperor of Japan during his visit, which was scheduled to take place between October 4, 1975 and October 7, 1975; the search for the aforementioned semi-automatic rifle is said to be related to the threat thus posed.

Sufficiency of the Affidavit

Findley's affidavit shows that at the time of purchase of the firearm in Inglewood, California, Young had directed that all her mail addressed to 1555 6th Avenue, Los Angeles, California, be forwarded to 3306 92nd Street, Jackson Heights, Queens, New York, and then to 925 Union Street (Apt. 4B), Brooklyn, New York. The fair reading of the affidavit, *United States* v. *Aentresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 746 (1965), affords a

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revealed that on August 30, 1974, Elizabeth Jane Young notified United States Postal Service officials of a change of address to 925 Union Street, Apartment 4B, Brooklyn, New York.

4. Investigation by your deponent and other Special Agents of the United States Secret Service which revealed that Elizabeth Jane Young presently resides at 925 Union Street, Apartment 4B, Brooklyn, New York. Such investigation included personal observation by Special Agent John Cunniff of the United States Secret Service of the premises above-described, which revealed the name "Young" on the mailbox for Apartment 4B.

basis for the magistrate's finding that Young, who was not a licensed importer, dealer or collector, transported the firearms to New York in violation of 18 U.S.C. § 922(a)(3). The records of Cole's Sporting Goods Store, and of the United States Postal Service, provided the necessary probable cause. *See United States* v. *Weatherford*, 471 F.2d 47, 49 (7th Cir. 1972), *cert. denied*, 411 U.S. 972, 93 S.Ct. 2144 (1973).

The Nexus Between the Purchase of the Gun and its Presence at Apartment 4B, 925 Union Street

The likely place for concealment of a semi-automatic rifle would be the owner's home, *United States* v. *Steeves*, 525 F.2d 33, 38 (8th Cir. 1975); *United States* v. *Rahn*, 511 F.2d 290, 294 (10th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3201 (U.S. 10/6/75). It was not necessary for the government to submit direct evidence that the firearm was on the premises to be searched. The probability that it was there is sufficient, *United States* v. *Mulligan*, 488 F.2d 732, 736 (9th Cir. 1973), *cert. denied*, 417 U.S. 9300, 94 S. Ct. 2640 (1974); *United States* v. *Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970).

Timeliness of the Search

The attack upon the warrant as being untimely is a claim that at the time of the issuance of the warrant, the magistrate did not have reasonable cause to believe that the gun was in Young's possession at that time—some 66 days after its purchase. Lapse of time is not the sole variable in determining whether the belief as to someone's possession of evidence is reasonable. A week might conceivably be too long a period for the search of perishable goods such as narcotics. The test to be applied must be the reasonable probability of whether Young

would likely have disposed of an automatic rifle, purchased under the circumstances in the case at bar, within the period of time which had passed. The expectation that the firearm was at the premises at the time of the warrant's issuance was not unreasonable. *United States* v. *Steeves*, *supra* at 37-38.

Misstatement in Supplemental Affidavit

The court finds the affidavit in support of the warrant is sufficient. The alleged misstatements in the supplemental affidavit are therefore inconsequential. *United States* v. *Gonzalez*, 488 F.2d 833, 838 (2d Cir. 1973).

Defendant's motions to suppress the evidence seized during the search at 925 Union Street are in all respects denied, and it is

So Ordered.

/s/ JACOB MISHLER
U.S.D.J.

Memorandum Decision and Order Denying Motion to Dismiss Superseding Indictment

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 75-CR-851

UNITED STATES OF AMERICA,

—against—

ELIZABETH JANE YOUNG and KENNETH RAYMOND CHIN,
Defendants.

June 16, 1976

MISHLER, *C.J.*

Defendant Elizabeth Jane Young moves to dismiss the superseding indictment filed April 19, 1976, on the ground that the acquittal after trial of the conspiracy count (Count One, of the prior indictment, collaterally estops the government from prosecuting on the superseding indictment). Alternatively, she moves to dismiss Counts Three and Four of the superseding indictment on the ground that prosecution on those counts would violate her fifth amendment right not ". . . for the same offense to be twice put in jeopardy of life and limb."

On November 11, 1975, the grand jury returned indictment 75 CR 851, charging that on July 29, 1975, and October 4, 1975, defendant conspired with Kenneth Raymond Chin to transport four (4) firearms[1] from Los

[1] The weapons were identified as a United States M- carbine, serial number 5487136; an Armalite AR 7 rifle, serial number 89474; an Armalite 180 rifle, serial number 12590; and an Armalite 180 rifle, serial number 12585.

Angeles, California, to Brooklyn, New York, where Young and Chin allegedly resided, in violation of 18 U.S.C. §§ 371, 922(a)(3). Two overt acts were alleged: (1) the purchase of an Armalite rifle, serial number 12585; and (2) the possession of said four (4) firearms at 925 Union Street, Brooklyn, New York. Defendant and Chin were also charged with transporting the firearms from California to their residence in Brooklyn. Immediately prior to trial, the court granted the government's motion to sever the trials of Young and Chin. The government elected to proceed first against Young. The jury returned a verdict of not guilty on Count One and was unable to agree on a verdict on Count Two. The court there upon declared a mistrial on Count Two.

The superseding eight-count indictment charges Young and Chin with the transportation and receipt of four firearms, *i.e.*, an Armalite AR-180, serial number 12585; an Armalite AR-180, serial number 12590; an Armalite AR-7, serial number 89474; and an M-1 carbine, serial number 5487136.

During the trial of the first indictment, before charging the jury, the court struck the testimony concerning the Armalite 180 rifle, serial number 12590, on the ground that the government had failed to prove that Young had transported the weapon into New York.[2] Defendant contends that this ruling was a determination precluding further prosecution for transporting and receiving the weapon as charged in Counts Three and Four of the superseding indictment. The court's ruling striking the testimony was an evidentiary ruling only, and

[2] The government's proof showed only that Coles Sporting Goods Store in California sold the gun to one Mark Choyei Kondo and that it was found in defendant's home when the said weapon and others were seized pursuant to a search warrant.

did not determine the guilt or innocence of Young with respect to the crimes charged; therefore, the ruling does not bar prosecution for importing and receiving the subject weapon as charged in Counts Three and Four of the superseding indictment.

Defendant further contends that the acquittal on the conspiracy count was a finding against the government on the two issues presented in the superseding indictment as to each firearm, *i.e.*, (1) transportation into the State of New York, and (2) receipt of the weapons by the defendants.[3]

In *Pereira* v. *United States*, 347 U.S. 1, 74 S.Ct. 358 (1954), defendants were convicted of three counts of mail fraud and conspiracy to commit the substantive crimes. The Supreme Court indicated the extent to which double jeopardy protects a defendant from convictions of both conspiracy and the substantive crime upon which the conspiracy is based as follows:

> It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both (citations omitted). Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy.

Id. at 11, 74 S.Ct. at 364.

The original indictment narrowly limited the charges to transporting firearms into New York State by a resi-

[3] The transportation charges are the odd numbered counts while the receiving charges are the even numbered counts.

dent of New York State,[4] and conspiring to transport the weapons into New York State (Count One). Defendant understood the specific issues involved in both counts.[5]

Proof of importation into New York State is not essential to prove the conspiracy charge. Proof that defendant was a resident of the State of New York at the time of the importation is an essential element of the substantive offense; for the conspiracy count, the government's burden on proof of residency was only to prove that the conspiracy contemplated that one of the conspirators be a resident of New York at the time of importation.

The not guilty verdict on the conspiracy count does not bar prosecution of the substantive counts charged in the superseding indictment, *United States* v. *Zane*, 495 F.2d 683, 691 (2d Cir. 1974); *United States* v. *Kramer*, 289 F.2d 909, 913 (2d Cir. 1961).

The motion to dismiss the indictment is in all respects denied, and it is

So ORDERED.

JACOB MISHLER
U. S. D. J.

[4] Count Two was based on the specific act of violating 18 U.S.C. § 922(a)(3) in that defendant was charged in the language of the section making it unlawful ". . . to transport into . . . the State where [s]he resides . . . any firearm purchased or otherwise obtained by such person outside that State. . . ."

[5] Defendant's counsel argued ". . . this is not a possession case . . . this is a case only concerning the illegal transportation of a firearm (Tr. p. 478)."